

STATE OF MICHIGAN
COURT OF APPEALS

PERCH RESEARCH INTERNATIONAL, INC.,

Plaintiff-Appellee,

v

WESTFIELD INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED

August 30, 2005

No. 252758

Saginaw Circuit Court

LC No. 02-044559-CK

Before: O'Connell, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Defendant appeals by leave granted from a trial court order denying its motion for summary disposition. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

On July 22, 2001, shortly after 6:00 p.m., plaintiff suffered a power failure at its commercial fish-raising facility. Power was not restored for more than four hours. Plaintiff's filtration and aeration systems did not operate during this interval, causing the loss of hundreds of thousands of fish, which plaintiff valued at \$168,000. Evidence presented to the trial court indicated a variety of possible reasons for the power failure.

Shortly after experiencing the power loss, plaintiff filed a claim with defendant, its insurer, who refused to compensate plaintiff for its loss on the ground that the cause of the loss fell under an exclusion contained in the policy of insurance. The exclusion at issue provides:

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

* * *

- e. Utility Services

The failure of power or other utility service supplied to the described premises, however caused, if the failure occurs away from the described premises. [Boldface type omitted.]

The utility exclusion is underscored by a weather exclusion, which applies “if weather conditions contributed in any way with a cause or event excluded in paragraph 1. above to produce the loss or damage” (boldface type omitted).

In denying defendant’s motion for summary disposition, the trial court quoted the utility exclusion and concluded that the language should be interpreted to read that “there is no coverage when the power failure occurs away from the premises, *i.e.*, at the utility’s power station or somewhere off the plaintiff’s premises.” The trial court then stated that while a specific substation was implicated in the power failure, there was no evidence regarding the exact location of the downed line that caused the substation to fail. Regarding this as a question of fact, the trial court denied the motion for summary disposition.

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support of a claim. *Decker v Flood*, 248 Mich App 75, 81; 638 NW2d 163 (2001). The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence filed in the action or submitted by the parties in the light most favorable to the nonmoving party. *Id.* “The court should grant the motion only if the affidavits or other documentary evidence show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Id.*

Plaintiff contends that the power outage may have resulted from an equipment failure on its premises. In support of its contention, plaintiff asserts that Consumers Power records indicate that the substation lost power at “approximately 6:12 p.m.,” while plaintiff’s alarm company put the time of plaintiff’s power loss at 6:08 p.m., which is four minutes earlier than when the Consumers Power records established the time of the loss. Plaintiff further points out that the same two references indicate a restoration of power only one minute apart. Plaintiff notes that the one-minute differential in this regard contrasts with the four-minute differential concerning when the respective outages began, and argues that the different intervals indicate separately caused power interruptions, not merely unmatched clocks. Given that we must apply the evidence in the light most favorable to the nonmoving party, we conclude that the trial court was correct in observing that a genuine issue of material fact exists as to the exact location of the power outage and whether it was, in fact, “away from Plaintiff’s premises.”¹

Based on the record before us, we cannot conclude with reasonable certainty that the power outage that resulted in plaintiff’s loss occurred solely “away from the described premises.” Having found that a question of fact exists, we conclude that the trial court properly denied defendant’s motion for summary disposition.

¹ We are limited to the evidence in the record as it existed at the time leave to appeal was granted. A majority of the panel would have denied leave to appeal in this case on the basis that we were not persuaded that this Court had a sufficient record to justify intervention in the matter.

Affirmed.

/s/ Peter D. O'Connell

/s/ Stephen L. Borrello